84-1587

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IN THE

Supreme Court of the United States

October Term, 1984

BEAUFORD D. EDDLETON,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

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135pp

QUESTIONS PRESENTED

I

What substantive relief is the petitioner entitled to resulting from the fact that Magistrate David Lowe found on May 10, 1983, that petitioner's Fifth Amendment rights were violated because the Respondent (Government) had not lived up to its plea bargain with petitioner.

II

Whether the petitioner is entitled to have his $10,000.00 fine suspended or vacated and the remaining term of his probation suspended or vacated based on the undisputed evidence presented of his personal and financial losses.

III

Whether the decision of the Fourth Circuit Court of Appeals, dated December 18, 1984, and the denial dated January 31, 1985, by that Court of the Petition to Rehear are contrary to established authority in other Circuit Courts of Appeal and the United States Supreme Court decisions.

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II. PETITIONER IS ENTITLED TO HAVE HIS $10,000.00 FINE SUSPENDED OR VACATED AND THE REMAINING TERM OF HIS PROBATION SUSPENDED OR VACATED BASED ON THE UNDISPUTED EVIDENCE PRESENTED OF HIS PERSONAL AND FINANCIAL LOSSES.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

NO.

BEAUFORD D. EDDLETON,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner BEAUFORD D. EDDLETON respectfully prays that a writ of certiorari issue to review the decisions of the Fourth Circuit Court of Appeals entered in this proceeding on December 18, 1984, and January 31, 1985.

OPINIONS BELOW

The orders of the United States Magistrate Court dated May 10, 1983, and November 21, 1983; the United States District Court dated September 14, 1983, and February 7, 1984; and the United States Fourth Circuit Court of Appeals dated December 18, 1984, and January 31, 1985, appear in the Appendix.

JURISDICTION

The order of the United States Fourth Circuit Court of Appeals denying petitioner's request for an appeal was entered on December 18, 1984. A subsequent order denying petitioner's request for rehearing was entered on January 31, 1985, and this petition for certiorari is filed within 60 days of entry of that order. This Court's jurisdiction is involved under 28 U.S.C. 1257.

STATUTORY PROVISIONS INVOLVED

Amendments to the United States Constitution:

V. "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor he deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

MOTION TO HAVE RECORD OF CASE SENT FROM FOURTH CIRCUIT COURT OF APPEALS

Petitioner respectfully moves the Court to have the entire record sent from the Fourth Circuit Court of Appeals to assist the Court in its review of this very involved case.

STATEMENT OF THE CASE

After being charged with four counts of failure to file an income tax return, petitioner agreed to plead guilty to one count in exchange for the government's agreement to dismiss the other three counts and "recommend a sentence in the case to the court, that sentence being a fine of $10,000.00 on Count 4 with suspended imposition of sentence and a probationary period to be determined by the Court." On July 14, 1982, the Magistrate imposed a one-year sentence, with all but ninety days suspended, a two-year probationary period, and a $10,000.00 fine. Petitioner subsequently filed several motions challenging that sentence.

The Magistrate denied his motion to suspend sentence and his motion for reduction of sentence. In October, 1982, petitioner filed a pro se motion under 28 U.S.C., Section 2255, to vacate or set aside the sentence. Finding on May 10, 1983, that the government had failed to comply with the plea agreement, the Magistrate gave petitioner twenty (20) days within which to withdraw the plea. Having served the ninety day sentence, petitioner declined to withdraw the plea and subject himself to further penalties. The petitioner filed a motion for resentencing specifically asking that his $10,000.00 fine and probation be suspended or vacated and nothing else.

At petitioner's second hearing before another Magistrate, petitioner was again sentenced to one year's confinement, but with all but four months suspended and a $10,000.00 fine. Thus, the net result of this illegal, unconstitutional and cruel sentence was the imposition of an additional month of confinement. On appeal, the District Court, which obviously realized the gross violation of petitioner's constitutional rights, remanded the case to the Magistrate for reimposition of the original sentence and to determine if petitioner was entitled to any additional relief. After reimposition of the fine and previously served sentence, petitioner, at the direction of the Magistrate, filed a Rule 35(b)

motion requesting suspension of the $10,000.00 fine. That Rule 35 motion was denied. The District Court, which said it could not say it would have made the Magistrate's decision nonetheless affirmed the Magistrate's decision. The Fourth Circuit Court of Appeals affirmed and denied a request for rehearing. The petitioner therefore stands with his original $10,000.00 fine and the remaining period of his probation. The Fourth Circuit Court of Appeals did grant petitioner's motion for stay so his fine remains unpaid pending final review by this Court.

Throughout these proceedings, petitioner has relied on Lane v. Williams, 455 U.S. 624, at 631, for

the proposition that he should be granted relief because of the harm and consequences which followed because the government did not live up to its plea bargain. Relief is not moot since fine is due.

The petitioner has also cited and relied on Santobello v. New York, 404 U.S. 257. The Fourth Circuit Court, petitioner submits, totally failed in its reliance on Santobello to understand the nature of this case.

Additionally, the Fourth Circuit Court totally ignored and did not understand the fact that other Circuits throughout the country have been able to deal with the factual situation presented herein, where it is infeasible for

petitioner to accept either of the two mandated remedies set out in Santobello v. New York. Amazingly, the Magistrate, in his May 10, 1983, opinion, understood petitioner's predicament and the Fourth Circuit Court did not. The Fourth Circuit Court ignored important cited authority, to-wit:

Correale v. United States,
479, F2d 944

Johnson v. Beto,
466 F2d 478 (5th Cir. 1972)

Lane v. Williams,
455 U.S. 624

Santobello v. New York,
404 U.S. 257 (1971)

United States v. Bowler,
585 F2d, 851

United States v. Brown,
500 F2d 375, 4th Cir. 1974

United States v. Carter,
454 F2d 426 (4th Cir. 1972)

United States v. Correa-DeJesus, 708 F2d 1283

United States v. Garcia, 698 F2d 31

United States v. Morgan, 346 U.S. 502

The Fourth Circuit Court's December 18, 1984, decision is inconsistent with all the above cases, other Circuit Court decisions, and United States Supreme Court guidelines set down in Lane v. Williams, 455 U.S. 624.

REASON FOR GRANTING THE WRIT

The petitioner submits that this court should grant him relief because of the harm and consequences which followed because the government did not live up to its plea bargain; Lane v. Williams, 455 U.S. 624 at page 631. (See also September 14, 1983, opinion of Judge Warriner).

Applying the legal principle set down in Lane v. Williams, the question becomes what harm and what consequences resulted to this petitioner because the government did not live up to its plea bargain. The following consequences were set out in the petitioner's November 10, 1983, Rule 35 motion which are well supported by the record. The

government's failure to live up to its plea bargain agreement resulted in the petitioner having to serve a 90-day jail sentence. The original plea bargain agreement did not call for any jail time. Needless to say, this 90-day jail sentence caused the petitioner great personal hardship. The petitioner had no criminal record. In fact, no one in his family had ever been to jail. Also, during the time the petitioner was in jail his father suffered a great illness which he subsequently died from. The petitioner was deprived of the right to spend time with his father because he was in jail. Financial losses suffered by the petitioner due to incarceration, greatly in excess of his

$10,000.00 fine, were previously put in the record. The petitioner still has not been able to renew his license to run his travel service business because he was incarcerated.

In addition, the newspapers have published and announced over a dozen times that the petitioner received 90 days in a federal institution. (Copies of newspaper articles were filed as exhibits with the petitioner's reply brief previously filed), and were in the file when Judge Schneider denied his motion.

Judge Schneider had the benefit of Judge Lowe's finding on May 10, 1983, that the government had not lived up to its plea bargain with the defendant.

Judge Lowe's order stated - what relief is defendant entitled to? He also had the benefit of all the testimony and letter exhibits which were offered at the petitioner's July, 1982, trial.

Also at the June 16, 1983, resentencing, Judge Schneider had a rare view and a detailed look at what happens to a defendant when he must serve a 90-day sentence. It often takes time for the consequences to develope so as to be clearly seen. Judge Schneider had the benefit of this overview.

Also, on November 21, 1983, the Judge had the benefit of Judge Warriner's September 14, 1983, ruling that the defendant was entitled to

substantive relief. The court also had the benefit of the newspaper articles which were in the file as exhibits to the petitioner's reply brief. The court also knew of the great expenses, attorney fees and costs, all of which the defendant incurred.

The Court, on June 16, 1983, heard more than ample evidence to suspend the petitioner's fine. All of these arguments were itemized on pages 15, 16, 17, and the first two paragraphs of page 18 of the petitioner's brief filed on July 26, 1983, and which are herein adopted.

Clearly this petitioner served 90 days in jail, which was not his agreement. Also, as a direct result he

suffered great personal and financial losses well in excess of $10,000.00.

In attempting to decide what relief the petitioner was entitled to, Judge Lowe looked, on May 10, 1983, to the case of United States v. Brown, 500 F2d 375 (1974) (4th. Cir.). In Brown, the defendant had only asked for "specific performance" of his agreement. As Judge Lowe noted, "such relief in the instant case would be of little use to the defendant, however, as he had already served the active term of his imprisonment imposed."

Since this petitioner did not wish to withdraw his guilty plea, he sought simply to have his fine and probation suspended or vacated. His reasoning

being that since his original agreement called for a suspension of jail sentence and payment of a fine, and since the reverse had happened as to his jail sentence, he sought a suspension of his fine and probation.

The petitioner argues that his position is analogous to a civil plaintiff (a term used to describe the appellant by Judge Warriner in his September, 1983, opinion). Clearly the petitioner suffered great financial and personal losses.

The petitioner respectfully submits that Judge Schneider's actions, instead of applying the law, had been to flagrantly disregard the law. "When the government breaches a plea agreement the choice of relief is largely committed to

the sound discretion of the court under the circumstances and where withdrawal of the plea or specific performance would be meaningless or infeasible, the court may order imposition of a specific sentence." United States v. Garcia, 698 F2d 31 at 32 and 37 (1st Cir.). The key point in the Garcia guideline is "choice of relief." Here, Judge Schneider, instead of choosing what type of relief, chose no relief.

"Where plea agreement has not been honored by the government, the fashioning of an appropriate remedy is largely a matter of the exercise of the sound discretion of the Court according to the circumstances of each case." United States v. Bowler, 585 F2d 851 at 856 (1978) (7th. Cir.). The Seventh Circuit

conception of "fashioning of an appropriate remedy" really never entered into Judge Schneider's decision. His remedy was no remedy.

What the petitioner is respectfully seeking in this Court is relief. The principal that he is entitled to relief is undisputed. In cases of this nature, the United States Supreme Court has consistently concluded that a defendant is entitled to relief. See Santobello v. New York, 404 U.S. 257 (1971); see Correale v. United States, 479 F2d 944 at 949.

Certainly the question of what type of relief will vary - "what is reasonably due in the circumstances....will vary." Santobello page 262, 92 S. Ct. at 499. In United States v. Carter,

454 F2d 426 (4th. Cir. 1972), for example, the Court held that if the promise which induced the appellant's plea to a stolen checks charge in the District of Columbia, was, as he alleged, that he would not be prosecuted elsewhere for anything having to do with the checks, then his subsequent ten-count indictment in the Eastern District of Virginia for forgery and conspiracy should be dismissed. See also Johnson v. Beto 466 F2d 478 (5th. Cir. 1972). See Correale, supra, page 50.

Just as the Garcia case recognized that further proceedings are not in the interest of justice (especially in lieu of the great expense to the petitioner and the government), Garcia, supra, page 37, this Court is requested to

allow the final chapter of this case to be that the petitioner's fine and probation are suspended or vacated. The net result being that the time the defendant served is his final sentence. Garcia, page 37.

By suspending the petitioner's fine and probation, this Court would, in essence, be, as an accepted form of remedy for relief, ordering the imposition of a specific sentence "where withdrawal of a guilty plea or specific performance by the government would be meaningless or infeasible." Correale v. United States, 479 F2d 944; United States v. Bowler, 585 F2d 851 at 856 (1978).

Clearly and unmistakably Judge Schneider had no intention of ever granting this petitioner relief. He initially, on June 16, 1983, imposed an extra one-month sentence on the petitioner, which was reversed on appeal. Even the government admitted (for different reasons than cited by the appellant) in its brief that the extra month's sentence was illegal. On remand he ignored the question of relief.

Since Judge Lowe adopted the Brown, supra, case as precedent in his May 10, 1983, opinion, Judge Schneider came into the picture. For the sake of argument, a different judge would arguably not have been necessary. See United States v. Bowler, 585 F2d 851 at 856.

But the petitioner has only followed the Court's guidelines. The petitioner submits that the failure of Judge Schneider to grant relief is indefensible. The failure of Judge Schneider to give any indication that he considered the question of relief is inexcusable

As Judge Warriner noted in his February 14, 1984, opinion, Judge Schneider did not need the instrument of a Rule 35 motion to deal with the mandated question of relief.

Notwithstanding the appellant's 2255 motion, certainly the district court had ample power to grant this appellant relief. Congress has empowered federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and

agreeable to the usages and principles of law." 28 U.S.C. Section 1651. The petitioner argues that since his constitutional rights were at stake, Judge Warriner should have vacated his fine and probation. This would be true even though his active jail sentence had expired. See United States v. Morgan, 346 U.S. 502; see United States v. Correa-DeJesus, 708 F2d 1283 at 1285 (1983). The Morgan court reasoned that prior to the passage of Section 2255 in 1948, Federal Courts had the power to issue what were referred to as writs of coram nobis to correct errors "of the most fundamental character", and that Congress had not intended when it enacted Section 2255 to eliminate that

power. Morgan, supra, at 514. Correa-DeJesus, supra, at 1285.

In examining the Lane v. Williams, 455 U.S. 624 case, which has been cited many times in these proceedings, it would certainly seem that on remand the Magistrate should have examined all known and all possible consequences which resulted because the respondent did not live up to its plea bargain. Just as in the Lane case, this petitioner has elected just to attack his sentence to remedy the constitutional harm.

Although the Lane Court found that the respondent's claims for relief "are moot" since "they had already been discharged from custody", (see Lane page 624) clearly and unmistably the

Lane court recognized the right to relief. Just as clearly this petitioner's $10,000.00 fine and his remaining months of supervised probation are part of his sentence and they are not "moot" questions.

The Lane court also commented on the fact that "the District Court may have inherent power to fashion on appropriate remedy for a violation of a constitutional right." See footnote 11, Lane page 631.

The petitioner simply argues that the respondent breached its plea bargain contract agreement with him (that fact is undisputed), and it was impossible to relieve him of his 90-day sentence because, as Judge Lowe noted on page 6,

of his memorandum of May 10, 1983, the petitioner "he has already served the active terms of imprisonment imposed." The remaining relief to the petitioner would logically and simply be a suspension or vacation of his fine and the remaining period of his probation.

Just as in the Lane case (page 631), this petitioner seeks to remedy the consequences which flowed from a violation of his constitutional rights.

The Fourth Circuit Court's reliance on United States v. Stumpf, 476 F2d 945 (page 3 of December 18, 1984, opinion) is clearly misplaced.

The "standard for review" applicable to this type of case is not to be found in United States v. Stumpf, supra, but rather in whether the sentencing Court

abused its discretion in its choice of an "appropriate remedy." United States v. Bowler, 585 F2d 851 at 856. There must be a remedy and relief.

The Fourth Circuit Court's use of Santobello v. New York, 404 U.S. 257, to limit the defendant's possible remedies to two (specific performance or withdrawal of plea), is clearly incorrect under the facts ot this case.

Mr. Santobello had not gone to jail. He was granted bail pending appeal and finally bail was set by Justice Harlan pending appeal to the United States Supreme Court (Santobello page 260). The Court's failure to note these important factual differences are a serious oversight in arriving at a correct decision in this case.

In Plaster v. United States, (4th. Cir. 1983), 720 F2d 340 at 351, the Fourth Circuit noted that the Santobell court did not set "the limits of its application," and the Court noted "although the main opinion left this choice to the discretion of the State court on remand, a majority of the Court held that the defendant's choice should be given considerable, if not controlling weight." 404 U.S. at 267, see Plaster footnote 19, page 351.

CONCLUSION

A writ of certiorari should be awarded.

BEAUFORD D. EDDLETON

BY _____
Counsel

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

UNITED STATES OF AMERICA,
Plaintiff

CRIMINAL ACTION NO. 82-00025-01-R
Magistrate's No. 82-0055M-01

v.

BEAUFORD D. EDDLETON,
Defendant.

O R D E R

IN accordance with the memorandum filed herewith, it is ORDERED that:

1. Defendant may file a motion to withdraw his plea of guilty herein within twenty (20) days of the date hereof.

2. Upon the filing of such motion, the Order of Judgment and Commitment will be set aside and defendant will be

permitted to plead anew before a United States Magistrate other than the one who took his original plea.

3. Failure to file the notice as described herein will result in reaffirmation of the plea, conviction, and sentence, i.e., they will not be set aside, and will preclude defendant from reasserting any of the claims raised in the present action in the future.

Let the Clerk send a copy of this Order, and a copy of the attached memorandum to the United States Attorney for this District, and to the defendant by certified mail, return receipt requested.

/s/ David G. Lowe
UNITED STATES MAGISTRATE

DATED: May 10, 1983

App. 3

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

UNITED STATES OF AMERICA,
Plaintiff

CRIMINAL ACTION NO. 82-00025-01-R
Magistrate's No. 82-0055M-01

v.

BEAUFORD D. EDDLETON,
Defendant.

M E M O R A N D U M

Beauford D. Eddleton, defendant, proceeding pro se, brings this Motion to Vacate, Set Aside, or Correct the Sentence imposed herein upon his plea of guilty to one count of the Willful Failure to File Income Tax Returns. Defendant consented to trial before the United States Magistrate and was duly

arraigned on May 12, 1982 on one of four counts of a criminal information. At that time, the Assistant United States Attorney in charge of the case set forth the terms of a plea bargain1/

1/The prosecutor made the following statement to the Court:

> The United States has reached the following agreement with counsel. We have told counsel and counsel has indicated that this bargain is acceptable. That upon a plea of guilty to Count 4 of this Information, the United States, at the time of sentencing, would move to dismiss Counts 1 through 3. The United States has further informed counsel that it would recommend a sentence in the case to the Court, that sentence being a fine of $10,000.00 on Count 4 with suspended imposition of sentence and a probationary period to be determined by the Court. Thank you, Your Honor.

providing that the Government would recommend a fine and an inactive jail

sentence with probation. He further indicated that the Government would move to dismiss Counts 1 through 3 of the Information, all in return for the defendant's plea of guilty to Count 4. Thus, the plea bargain consisted of two agreements by the United States. The first, to move for dismissal of Counts 1 through 3, falls under the purview of Rule 11(e)(1)(A) of the Federal Rules of Criminal Procedure. The second, to recommend a specific sentence, is of the type delineated under Rule 11(e)(1)(B). There is no question that the first part of the plea bargain was fulfilled. It is the second part which defendant maintains was breached, because, "The Court failed to go along with the plea agreement..." (Page 4-A of Defendant's

Motion).

Before accepting the plea, the Court advised defendant in the strongest terms that he could not rely on any belief that the Court would follow the recommendation of the prosecutor.2/. Thereafter, at sentencing, as Assistant United States Attorney made a statement that there had been an agreement to make a recommendation, including a suspended imposition of sentence. The statement was rejected and an active term of imprisonment was imposed.3/

2/The Court advised defendant:

> Now, Mr. Eddleton, I want to make one thing clear because I don't know that it has been made clear to you, and that is that the Court does not listen to recommendations by the United States Attorney in tax matters when it comes to penalties. (TR 7-8).

3/A portion of the sentence in dispute provided that the defendant be delivered to the custody of the United States Attorney General for one year, with all but 90 days suspended, followed by a probationary period of two years.

During the eight weeks between the entry of his plea of guilty and his sentencing, defendant never indicated his dissatisfaction with the plea agreement, nor did he attempt to withdraw his plea of guilty. It was not until October 6, 1982, some 19 weeks after the arraignment, and some 11 weeks after sentencing that plaintiff first raised the issue of a broken plea bargain, notwithstanding motions and memoranda concerning possible stays of execution and reductions of sentence that were filed in the interim.

Importantly, defendant has nowhere alleged that he was misinformed by the United States Attorney, the Court, or even by his own attorneys, that he would actually receive the sentence recommended. His apparent contention is that the Court was required to accept the recommendation. This claim is foreclosed, however, by United States v. Schmader, 650 F.2d 533, 534 (4th Cir.), cert denied, 454 U.S. 898 (1981) where the Court stated:

> The imposition of a longer sentence than that recommended by the Government to fulfill a Rule 11 (e)(1)(B) agreement does not constitute a rejection of the plea bargaining agreement bringing the provisions of 11(e)(4) into operation. (Citations omitted).

More troublesome, however, is a problem tangential to the obligation of

the Court in Rule 11(e)(1)(B) agreements, which the defendant may possibly be attempting to assert. Since he is proceeding pro se, although not in forma pauperis, the Court will liberally construe his pleadings to include a claim that the prosecutor failed to follow through on his promises. See Haines v. Kerner, 404 U.S. 519 (1972).

The Supreme Court has held that:

> ...(W)hen a (guilty) plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.

Santobello v. New York, 404 U.S. 257, 262 (1971).

The Assistant United States Attorney representing the Government at arraignment unequivocally agreed to recommend

probation at sentencing. Notwithstanding the admonition by the Court that such a recommendation was nonbinding, the United States had an affirmative duty to follow through with its agreement, and to attempt, in good faith, to influence the Court favorably to consider the recommendation. United States v. Brown, 500 F.2d 375 (1974); Massie v. Blankenship, 469 F. Supp. 686 (E.D. Va 1979). The Assistant United States Attorney who represented the Government at sentencing failed to live up to this standard. His sole statement to the Court was, "There's a recommendation agreed to by Mr. Carpenter in this matter, that a suspended imposition of sentence be imposed and a fine of $10,000.00". This "statement", coupled with the prosecutor's attempt to

discredit defendant's witnesses, who testified in mitigation, lead the Court to conclude that the prosecutor was "not fully in favor" of the recommendation of probation. Under these circumstances, the Court concludes that the Government did not comply with the terms of its plea bargain with defendant. As stated by the Court in United States v. Brown, supra, at 377:

> In the instant case, we believe that the Government failed to keep its bargain. We have no occasion to consider the propriety of sentence, or recommendation as to sentence as an element of a plea bargain, but it is manifest that the consideration which induced defendant's guilty plea was not simply the prospect of a formal recitation of a possible sentence, but rather, the promise that an Assistant United States Attorney would make a <u>recommendation</u> on sentencing. This could reasonably be expected to be the sound advice, expressed with some

> degree of advocacy, of a Government officer familiar with the defendant, and with his record and cognizant of his public duty as a prosecutor for the United States.
>
> ...Whether the prosecutor's half-heartedness in presenting the recommendation was a factor in the District Court's imposing a sentence more severe than that "recommended", is a matter into which we need not inquire.

That the Magistrate disavowed the actions of the Assistant United States Attorney at sentencing, and so indicated on the record, does not cure the basic infirmity of which defendant complains. Santobello v. New York, supra at 262; Id. at 377-378.4/

There remains to be decided the relief to which defendant is entitled. In Brown, the petitioner asked only for "specific performance" of the agreement.

The court remanded the case with instructions that defendant be resentenced by a different judge after a good faith recommendation concerning the sentence. Id. at 378. Such relief in the instant case

---

4/A second ground for setting aside the sentence may well be misconduct by the prosecutor. Unlike the situation in Santobello, no claim can be made in the instant case that the breach of the agreement was inadvertent. For here, the Assistant United States Attorney, representing the Government at sentencing, advised the Court of the particulars of the previously agreed upon bargain. (TR 16). He can hardly claim ignorance.

would be of little use to the defendant, however, as he has already served the active term of imprisonment imposed.5/ On the other hand, defendant has claimed a defense to the original charge. Thus,

he may wish to have his conviction set aside in order to assert that defense.

Accordingly, defendant will be afforded an opportunity to withdraw his plea of guilty to Count 4 of the Information. Should he wish to avail himself of this opportunity, he must notify the Court, in writing, of his desire within twenty (20) days. All that will be required of the defendant will be a simple written statement that he wishes to withdraw his plea of guilty. Thereupon, the plea will be set aside and the case transferred to another United States Magistrate in this District for further proceedings. Should plaintiff fail to file such written notice, his plea, conviction, and sentence, shall stand; and, he will not be permitted to raise the issues

presented in his current Section 2255 motion in the future.

In view of the disposition of this case, the Court need not consider the other claims presented by the defendant.

An appropriate order shall issue.

/s/ David G. Lowe
UNITED STATES MAGISTRATE

Dated: May 10, 1983

5/The motion to set aside, vacate, or correct the sentence was filed on October 6, 1981 while defendant was incarcerated. The delay in acting on this petition was caused primarily by defendant's attempts to represent himself herein. For example, he appealed the denial of his Motion for Reduction of Sentence to a United States District Judge. He filed a Motion to "Recluse" the Magistrate and a second United States District Judge from consideration of this action. Upon denial of that motion, he filed a notice of appeal to the United States Court of Appeals

for the Fourth Circuit. In the interim, he withdrew his notice of appeal of the Rule 35 action. Ultimately, the United States Court of Appeals dismissed his appeal from the denial of his motion to "recluse" on March 14, 1983. In the interim, defendant was released from incarceration in November of 1982.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	CRIMINAL NO.
	)	83-00049-R
BEAUFORD D. EDDLETON	)	

OPINION

Viewed at close range the disposition of this case in the Magistrate's court does not appear to transgress our ideas of ordered justice. Having been charged with four misdemeanor violations, defendant entered into a plea bargain with the government under which he agreed to plead guilty to one of the counts while the government, venturing into the treacherous ground of sentence plea-bargaining, agreed to recommend that

defendant receive a fine of $10,000.00 with no active jail time. At sentencing the government's performance of its bargain was perfunctory. Defendant received an active sentence of three months in jail and a $10,000.00 fine.

Though defendant never complained of the government's breach of its bargain to recommend (rather than merely state its obligation to recommend) no active jail time, the sentencing Magistrate sua sponte subsequently raised the issue and offered defendant an opportunity to withdraw his plea. For the very practical reason that defendant had already served the jail time, he declined to withdraw his plea, as there could be little possible benefit to him through that means, but instead sought, most

ineptly, to obtain a reduction or an elimination of the unpaid $10,000.00 fine.

Rather than simply move the sentencing court to reduce or vacate the fine, defendant moved the court to grant him a resentencing. The motion is confusing but that it contained a request that he be resentenced, and that he be resentenced by a different judge, cannot be denied. A sketch for an order was tendered with the motion but the Magistrate drafted his own order granting the gist of defendant's motion, that he be resentenced and that he be resentenced by a different judge.

The Magistrate to whom the matter was referred with meticulous care explained to defendant and his counsel that resentencing made defendant liable for

incarceration of up to one year as well as a $10,000.00 fine. With a welter of words which are hard to follow, defendant, through his counsel, consented to proceed with the hearing on that basis. After a full hearing and an appropriate recommendation by the government in accordance with the original plea bargain, the sentencing court imposed a fine of $10,000.00 and sentenced defendant to an active term of four months in jail with credit for the three months previously served.

Defendant appeals alleging double jeopardy.

Viewed close-up, as I have said, it appears that defendant, being fully advised, chose the option of resentencing and thus cannot complain if, as he was

fully warned, his choice turned out to be a bad one.

Viewed from a distance, however, with a better perspective, the result seems contrary to our sense of ordered justice.

There is no dispute that the government reneged on its bargain by failing persuasively to seek no active jail time at the original sentencing. When the sentencing judge perceived that defendant had been mistreated by this dereliction on the part of the government, he sought a means of redressing defendant's grievance. Defendant's bungling in the process should not override the clear duty of the court to grant defendant substantive relief, rather than mere procedural relief.

Specific performance of the govern-

ment's contract was no longer feasible. The three months defendant had spent in jail could not be reimbursed him. It would have been foolish for defendant to withdraw his guilty plea and expose himself to conviction on all four counts with a possible punishment of up to four years in jail and a $40,000.00 fine. Seeking a resentencing by a new judge was, itself, foolish. But the outcome of this foolishness was hurtful to defendant rather than helpful, as it should have been.

This sentence is VACATED and the action is REMANDED to the Magistrate's court for the reimposition of the original sentence and for the consideration, thereafter, of such relief, if any, which plaintiff may be entitled in the way of relief from

that sentence, as a consequence of the failure of the government to live up to its bargain.

And it is so ORDERED.

/s/ D. Dortch Warriner
UNITED STATES DISTRICT JUDGE

Date: 14 September 1983

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

UNITED STATES OF AMERICA	)	
	)	
vs.	)	CRIMINAL NO.
	)	82-0055M-01
BEAUFORD D. EDDLETON,	)	
Defendant.	)	

ORDER

The defendant has filed a motion for reduction of sentence pursuant to Rule 35, Federal Rules of Criminal Procedure. The United States has filed its response, in which it takes no position as to the disposition of defendant's motion. After mature consideration of his request and in light of the facts and circumstances in this case, the Court is of the opinion that the sentence herein imposed on November 9, 1983 was appropriate.

Accordingly, his motion will be DENIED.

It has come to the attention of the Court that the judgment and commitment order entered herein on November 9, 1983 provided that the defendant be given credit for all periods of incarceration previously served but neglected to make reference to periods of probation. It was and is the intention of the Court that the defendant be given credit for all periods of probation previously served.

And it is so ORDERED.

Let the Clerk send copies of this Order to all counsel.

/s/ David Schneider
UNITED STATES MAGISTRATE

Date: 11/21/83

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	CRIMINAL NO.
	)	83-00097-R
BEAUFORD D. EDDLETON	)	

OPINION

In the briefing in this case the parties have from time to time listed the orders or actions of the Magistrate to which appeal to this court is sought. The lists vary and no one list seems to encompass all that is set forth in the two notices of appeal nor do they encompass all that are at one time or another discussed in the briefs. In an attempt to be encompassing, I will list the issues which are, or which may be,

properly presented on this appeal:

I. The absence of an audio tape record of the proceedings before the Magistrate on 9 November 1983;

II. The Magistrate's failure to grant defendant's motion for a recusal;

III. The Magistrate's failure to grant defendant's motion for a transfer to the Western District of Virginia;

IV. The Magistrate's refusal to grant defendant's motion on 9 November to reduce defendant's sentence;

V. The Magistrate's refusal to grant defendant's motion on 21 November to reduce sentence;

VI. The Magistrate's failure to comply with the mandate of this Court to "determine what relief the defendant was entitled to..." (Notice of Appeal, 21 November 1983).

I will take the issues up in the order listed above.

I

While I find nothing bearing directly upon an appeal from a magistrate to the United States District Court in a criminal case, such as is presently before me, both Rules of App. Proc. 10(c) and Fed. R. Civ. P. 75(b)(3) deal with the problem created when there is an appeal with no record of the proceedings appealed from available. Nothing in the record indicates defendant sought to avail himself of the provisions of either of these rules nor of any analogous process to bring forward an appropriate record of the proceedings before the Magistrate. His failure in this regard would be sufficient to dismiss the appeal

on this ground since appellant has the obligation under ordinary circumstances to perfect his appeal. See Rules of App. Proc. 10(b). But there is more.

Eddleton makes clear in his rebuttal brief, pages 2-3, that he is not claiming any prejudice because of the absence of an audio tape, and hence a transcript, of the hearing of 9 November. He only complains of a failure to comply with Rule 5 of the Rules of Procedure for the Trial of Misdemeanors and argues that this failure is a per se basis for reversal.[1] The harmless error rule as set forth in the Fed. R. Civ. P. 61, and as set forth in 28 U.S.C. §§ 2111, and as recently enunciated by the Supreme Court in McDonough Power Equipment, Inc. v. Greenwood, _____U.S. _____, _____

(18 January 1984) (Slip Op. at pp. 5-6) are more than sufficient to show that even the most blatant violation of Rule 5, where it causes no prejudice, is not grounds for a reversal.

II

Defendant's motion for a recusal failed to comply with a plain and explicit provision of 28 U.S.C. §§ 144. The statute provides that the affidavit of bias or prejudice "shall be accompanied by a certificate of counsel of record stating that it is made in good faith." There is nothing complicated about this provision. It was either overlooked by counsel or counsel, in good faith, could not comply. Whatever the reason for its omission, its omission is fatal to a motion of recusal under §§ 144. Morse v.

Lewis, 54 F.2d 1027-1032 (4th Cir. 1932), cert. denied, 286 U.S. 557 (1932); Johns Hopkins University v. Hutton, 316 F. Supp. 698, 700 (D. Md. 1970).

1"...the appellant's only concern is that Rule 5....calls for use of a Court Reporter or suitable sound recording equipment..." Rebuttal Brief filed 2/2/84, p.2.

In addition to counsel's failure to comply with the statutory requirement of a certificate, there are other glaring inadequacies in the affidavit, e.g., a failure to allege facts showing personal bias, which I will not pursue.

III

Plaintiff assigns error to the Magistrate's refusal to transfer the case to a judge or magistrate in the Western District of Virginia. No appropriate

authority is cited which would enable the Magistrate to effect such a transfer. Such discretion was not included in the mandate from this Court. No such discretion exists in the Local Rules of Court nor does Fed. R. Crim. P. 21 permit such a transfer on the factual basis espoused by defendant. There simply is no authority nor reason to support defendant's claim of error in this regard. It is perhaps for this reason that defendant offered no argument in brief on the point.

IV

The issues raised in IV, V, and VI, are but different ways of stating the same complaint. Defendant earnestly believes that the fine imposed upon him in the amount of $10,000.00 should have

been reduced in view of the Magistrate's subsequent finding that the prosecutor had failed in good faith to urge the Court to impose a suspended sentence. The opinion of this court, entered on 14 September 1983 in an earlier appeal, supports a view that the circumstances of the case warrant consideration for a reduction of the fine originally imposed. The mandate of the Court did not, however, pretend to substitute the opinion of this court for the opinion of the sentencing court. The opinion concluded:

> This sentence is VACATED and the action is REMANDED to the Magistrate's court for the reimposition of the original sentence and for the consideration, thereafter, of such relief, if any, which plaintiff may be entitled in the way of relief from that sentence, as a consequence of the failure of the government to live up to its bargain.

I have examined the record with care. The Magistrate fully complied with the spirit of the remand. I cannot say that I would have followed the same course as the Magistrate since I have not had the obligation and responsibility of making the determination he made, but that he conscientiously and carefully complied with the mandate of the Court is manifest. There is no error in this regard.

V

There appeared to be some procedural confusion in how best defendant's desire that his sentence be reduced be presented to the Magistrate. Fed. R. Crim. P. 35(b) was a ready tool and it was used. I do not believe it was an essential tool since I think the mandate itself formed an appropriate basis upon which the issue

might properly have been presented to the Magistrate. In any event, by permitting defendant to file a second motion under Rule 35(b), after the proceedings of 9 November, the Magistrate afforded defendant yet another opportunity to persuade the Magistrate that the fine should be reduced. The fact that by the order of 21 November the Magistrate signified his adherence to his prior view is of no consequence. Motions under Rule 35 are addressed to the sound discretion of the sentencing court. The discretion there entrusted to the sentencing court cannot be distinguished from the discretion entrusted to the sentencing court under the mandate of this Court of 14 September 1983.

VI

It appears that both the refusal to reduce the fine of 9 November and the refusal to reduce the fine of 21 November were procedurally reached through motions under Rule 35(b). As I have hereinabove indicated, such a procedural positioning was unnecessary. The mandate itself directed the Magistrate to give "consideration" to such relief as defendant might be entitled. Had defendant failed or refused to file motions under Rule 35(b), the Magistrate was nevertheless burdened with the duty of considering and deciding the issue presented by the mandate.

The fact, however, that defendant chose, or the Magistrate directed, that the proceeding be by way of Rule 35 is of

no moment. However the matter may have been presented, the Magistrate complied in a timely and conscientious manner to the issue presented. The central question which has been at issue since Magistrate Lowe first raised the issue was, what substantive relief, if any, is the appellant entitled to? Magistrate Schneider, having considered fully the facts and the law, has answered the question: None.

The judgment is AFFIRMED.

And it is so ORDERED.

/s/ D. Dortch Warriner
UNITED STATES DISTRICT JUDGE

Date: 7 February 1984

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-6170

United States of America, Appellee,

-versus-

Beauford D. Eddleton, Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond.
D. Dortch Warriner, District Judge
(CR 83-00097-R)

Argued: October 5, 1984.

Decided: December 18, 1984

Before RUSSELL, HALL and WILKINSON, Circuit Judges.

Robert S. Ganey for Appellant; John T. Tucker, III, Student Assistant to the United States Attorney, C. Wingate Grant, Assistant United States Attorney (Elsie L. Munsell, United States Attorney, Gregory Welsh, Assistant United States Attorney on brief) for Appellee.

PER CURIAM:

Beauford D. Eddleton appeals from the district court's denial of his Rule 35(b), Fed. R.Crim.P., motion to vacate or suspend the $10,000.00 fine he received after his conviction for failing to file an income tax return in violation of 26 U.S.C. §§ 7203. Eddleton argues that the great hardship he has suffered as a result of his imprisonment and the attendant publicity, coupled with the government's failure to abide by the original plea agreement, compel the reversal of the denial of the motion.

Because we find that the district court did not abuse its discretion and that Eddleton has already received the only relief to which he is entitled, we affirm.

After being charged with four counts of criminal tax violation, Eddleton agreed to plead guilty to one count in exchange for the government's agreement to dismiss the other three counts and "recommend a sentence in the case to the Court, that sentence being a fine of $10,000.00 on Count 4 with suspended imposition of sentence and a probationary period to be determined by the Court." On July 14, 1982 the Magistrate imposed a one year sentence, with all but ninety days suspended, a two year probationary period, and a $10,000.00 fine. Eddleton

subsequently filed several motions challenging that sentence. The Magistrate denied his motion to suspend sentence and his motion for reduction of sentence. In October, 1982, Eddleton filed a motion under 28 U.S.C. §§ 2255 to vacate or set aside the sentence. Finding that the government had failed to comply with the plea agreement, the Magistrate gave Eddleton twenty days within which to withdraw the plea. Having served the ninety-day sentence, Eddleton declined to withdraw the plea and subject himself to further penalties. Thus, Eddleton filed a motion for resentencing, which was granted.

At Eddleton's second hearing before another Magistrate, Eddleton was again sentenced to one year's confinement,

but with all but four months suspended and a $10,000.00 fine. Thus, the net result of the resentencing was the imposition of an additional month of confinement. On appeal, the district court remanded the case to the Magistrate for reimposition of the original sentence and to determine if Eddleton was entitled to any additional relief. After reimposition of the fine and previously served sentence, Eddleton filed his Rule 35(b) motion requesting suspension of the $10,000.00 fine, the appeal from which is presently before us.

The standard for review of the sentencing court's disposition of a Rule 35 motion is whether the lower court clearly abused its discretion. United States v. Stumpf, 476 F.2d 945, 946

(4th Cir. 1974) (per curiam). The lower court did not abuse its discretion. The original plea agreement was that the government would recommend a suspended sentence. The sentencing judge was not bound to abide by that recommendation, and Eddleton does not argue that the government was required to do anything but recommend a suspended sentence. Therefore, the fact that the sentencing judge did not abide by the government's recommendation does not entitle Eddleton to a reduced or vacated sentence.

Furthermore, Eddleton has already been afforded any relief that this court might grant. Specific performance of the plea, even if appropriate, is impossible, because Eddleton has already served three months. Eddleton has been granted the

only other relief to which he may be entitled-- an opportunity to withdraw his guilty plea. Although he decided not to subject himself to a possible new trial, Eddleton was resentenced. At that hearing, the government more than complied with its original bargain by strongly recommending probation. Thus, Eddleton has received all the relief that this court would grant him. Santobello v. United States, 404 U.S. 257 (1971).

Accordingly, the judgment of the district court is

AFFIRMED.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-6170

United States of America,
Appellee,

versus

Beauford D. Eddleton,
Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. D. Dortch Warriner, District Judge.

Upon consideration of the appellant's petition for rehearing,

IT IS ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Russell with the concurrence of Judge

Hall and Judge Wilkinson.

For the Court,

John M. Greacen
Clerk

F I L E D:
January 31 1985
U.S. Court of Appeals
Fourth Circuit

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 84-6170

United States of America, Appellee,

versus

Beauford D. Eddleton, Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. D. Dortch Warriner, District Judge.

Upon consideration of appeallant's motion for a stay of mandate pending application for certiorari, and the government's response to the motion,

IT IS ORDERED that a stay of this Court's mandate pending application for writ of certiorari to the United States

Supreme Court is hereby granted provided that appellant shall not sell, dispose of, or otherwise dissipate assets pending the action of the United States Supreme Court.

Entered at the direction of Judge Russell with the concurrence of Judge Hall and Judge Wilkinson.

For the Court,

John M. Greacen
Clerk

F I L E D:

March 5 1985

U.S. Court of Appeals
Fourth Circuit